IN THE COURT OF COMMON PLEAS, FRANKLIN COUNTY, OHIO
CIVIL DIVISION

ALAN ZWEGAT, *et al.* and the Class of Retirees they represent, Plaintiffs,	:	
vs.	:	Case No. 18CV-10593 (Judge Frye)
BOARD OF TRUSTEES, OHIO POLICE AND FIRE PENSION FUND, Defendant.	:	

DECISION FOLLOWING BENCH TRIAL.

Nelson E. Genshaft, Joel R. Campbell, and Anthony Chambers, Strip, Hoppers, Leithart, McGrath & Terlecky Co., LPA, for plaintiffs.

John P. Gilligan, Daniel R. Swetnam, and Steven D. Forry, Ice Miller LLP, and Mary Beth Foley, OP & F General Counsel, for defendant.

I. Introduction.

This class action lawsuit challenges decisions by the Ohio Police and Fire Pension Fund governing board with respect to medical and drug coverage for retirees.

Effective January 1, 2019, significant changes took effect. Essentially OP&F retirees were moved from a self-insured insurance plan to an entirely new system in which OP&F only distributed monthly stipends to retirees to assist in paying for coverage purchased in the private marketplace. Changes fell most harshly upon retirees not yet old enough to be eligible for coverage through Medicare.[1] This was estimated to be about 30% (or 8,000) current OP&F retirees. (Tr. 58). A relatively small number of OP&F retirees simply will never qualify for Medicare, so they too must find insurance in the private marketplace.

[1] The average age of OP&F retirees is about 54, leaving those persons (and their families) in the private medical and drug coverage marketplace for over a decade until they reach age 65.

The reader's familiarity with prior proceedings in this case is assumed. A bench trial commenced on June 10. The court and counsel made a serious effort to accelerate the proceedings, given the large number of class members and the public interest in protecting first responders after they reach retirement. However, after fourteen witnesses and three days of testimony a defense witness advised the court that there might be additional, as-yet unproduced records in files kept by the Board, and that these records might be material to the issues before the court. Plaintiffs accepted the court's offer of a recess in trial to allow a meaningful search, together with the opportunity to re-call (or depose) witnesses about any new material. Due to the schedules of counsel and the court, that recess necessitated a two-month delay. Trial was completed with additional testimony on August 29 – 30, 2019.

The court is grateful to counsel for their thorough presentation of this case. OP&F retirees have had their issues examined fully and in a timely manner. The court's findings of fact and conclusions of law are set forth below.

II. General Background for Claims.

OP&F members are owed a statutory duty protecting their pensions and disability payments. As explained more fully below, the OP&F Board has no comparable obligation to provide health care; that benefit is permitted but not required. Nevertheless, for decades OP&F has made available a very generous health care benefits program using a self-funded model. In recent years that health care program was administered by UnitedHealthcare.

Over recent decades, and particularly in the wake of the Great Recession, concern has grown about the long-term viability of defined benefit pension plans, particularly those in the public sector. Ohio is not alone in this regard.[2] In 2012, the Ohio General Assembly adopted a Pension Reform Act in an effort to maintain reserves sufficient to pay pensions and other core obligations in all state retirement plans including this one for police and firefighters. The General Assembly mandated that plans meet a 30-year amortization period to fund pension benefits (not including health care). This goal of

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[2] *See, In re: Kentucky Employees Retirement System and Bd. Of Trustees v. Seven Counties Services, Inc.*, 580 S.W.3d 530 (Ky. 2019).

being able to fund all benefits within a 30-year window is somewhat ambitious, given that plans manage billions of dollars but with little control over the returns their investments may yield in the ebb and flow of the general economy. As a result, pensions and other core obligations of the OP&F were the priority for available funds. (See, Def. Ex. K, p.1.)

Concern over long-term viability of the retirement fund was a key factor leading to the difficulties experienced by the plaintiff class as raised in this case. Efforts to lobby the General Assembly for more public funding to better underwrite obligations of the pension system while addressing health care needs of retirees, and other potential solutions such as broadening benefits available through Ohio Workers Compensation or lowering the Medicare eligibility age for first responders (which requires an Act of Congress), proved futile.

Because this is a public employee retirement system the General Assembly makes most key decisions. However, the legislature has made the OP&F Board the public face of the organization. It is charged with actually administering the system. The OP&F Board is comprised of 9 volunteer members. Pursuant to R.C. 742.03, six are elected to staggered four-year terms, including two current police officers, two current firefighters, one retired police officer and one retired firefighter. By law they are elected by their respective constituencies. The other three statutory members are appointed: one by the Governor, one by the Treasurer of State, and one jointly by the President of the Ohio Senate and the Speaker of the House.

Board members invest a great deal of work. As summarized on the timeline of significant events included as an Appendix to this Decision, Board members meet eleven times during the year, and participate in an annual retreat. Board members receive no compensation other than expense reimbursement. It is a cruel irony, therefore, that OP&F's volunteer Board members have been blamed – and in the last election three lost their seats – because they were obligated to enforce funding priorities dictated by the General Assembly.

To meet the 30-year funding requirement for retirement benefits dictated by the General Assembly, the OP&F Board focused upon their discretionary spending on health care. In spring 2015, the Board learned of the projected insolvency (within 9-10 years) of the Health Care Stabilization Fund ("HCSF") as then structured. (Def. Exs. A, C.) This

projection occurred notwithstanding that the HCSF balance exceeded $900 million at the time. (Def. Ex. M, Trial p. 464.)

There is no evidence that the Board was deceitful in reporting to members that "the Board [has] reaffirmed its commitment to retiree health care and to investigate all solutions to extend its long-term funding." (Def. Ex. C, Trial p. 63.) In September 2015, the Board issued a Request for Proposal ("RFP") seeking advice on the best options for the health care fund going forward. (Def. Ex. G.) In January 2016, health care consulting firm Gabriel Roeder Smith ("GRS") was retained to advise the Board. By then, assets in the HCSF were only projected to last less than9 years. (Def. Ex. R, Trial p. 796.) For 2015 the OP&F's total health care costs were $213 million. (*Id.*)[3]

In June 2016, the Board adopted recommended changes to the health care plan. (Def. Ex. R, Trial p. 801.) Further study followed. Despite efforts by the Board to preserve the status quo, a vote to exit the self-insured model and move to an individualized plan with a stipend for retirees to purchase their own insurance was taken on March 29, 2017. (Def. Ex. CC) In May 2017, the Board issued an RFP to select a vendor for the new health care plan. (Pl. Ex. 8) The initial RFP resulted in six vendors submitting timely proposals. (Def. Ex. KK, Trial p. 1551) These were narrowed down to three finalists: United Healthcare, Conduent, and AON Hewitt. (Pl. Ex. 98) Although it had been administering the OP&F program for some years United Healthcare's proposal to go forward (Def. Ex. CCCC) was essentially nonresponsive to the Board's conclusion that OP&F had to exit the generous self-funded program. (Def. Ex. HHHH).

After a meaningful review of proposals, the Board selected AON Hewitt to assist OP&F in designing and transitioning members, both Medicare and non-Medicare eligible, to market place exchanges for health care. This Board vote was unanimous, and occurred

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3 The OP&F Board not only cannot control the investment returns received on available funds, but also face a pool of retirees generally assumed to experience greater than normal health care needs. First responders suffer work-related injuries at a higher rate than employees in more sedentary occupations. The lead named-plaintiff suffered work-related incidents that included "miscellaneous strains, sprains, laceration injuries" and falling through several building floors that collapsed on him. (Tr. 30). One such fall resulted in two fractures of his back, but he only missed the balance of his fire shift because he was "worried they would pension me out, because I had a wife and kids to feed. *** I'm not a complainer." (Tr. 30-31). Only years later - after some 20 years of chronic problems - did he have surgery. (Tr. 31). Obtaining good insurance for a population of retirees expected to have higher than normal morbidity, and whose collective claim history is well-documented in the previous years of OP&F's self-funded experience, is no small task.

November 15, 2017. (Def. Ex. PP, Trial p. 1694.) Implementation followed in 2018, and the new health care arrangements took effect January 1, 2019. (Def. Exs. VV, WW.)

Plaintiffs brought this case to challenge the change from a self-funded medical plan to a system in which members receive a monthly stipend to be used to purchase medical coverage in the Affordable Care Act marketplace or, if eligibility is available, through Medicare. The new system initially limited OP&F retirees to medical plans offered through AON. Although AON was selected through a competitive process, its offerings left some members understandably dissatisfied. More fundamentally, the wholesale change to a stipend system did not satisfy many retirees, particularly those under 65 and not yet eligible for Medicare. The types of criticisms raised in this case can be briefly summarized.

Geography created one set of problems. Rural areas of Ohio are under-served in the private insurance market (notwithstanding the Affordable Care Act.) For instance, only six OP&F retirees live in Gallia County and all are under 65 years of age. Under the AON insurance exchange, the only coverage offered limited hospital availability and required travel to either Scioto County or Ross County for retirees in Gallia County. The local hospital (Holzer Medical Center) was not included in medical plans available through AON. (Tr. 126 – 130, 132). Another retiree who is a named plaintiff lost his access to Cleveland Clinic, where he previously had received very significant medical and surgical care. (Tr. 45-46).

Retirees living outside Ohio for some months of the year were also inconvenienced. The old self-funded plan was nationwide. (Tr.104). One witness who lives part of the year in Florida suffers from Crohn's Disease, requiring an infusion every eight-weeks. This, in turn, requires him to fly back to Ohio where his medical coverage will pay for such treatments at The James. In Florida, he is entitled only to emergency care under his new medical coverage. (Tr.105 – 07, 113). Another witness is a full-time Florida resident but regularly visits Ohio. While here he has the same difficulty: only emergency coverage. (Tr. 140 - 41). Furthermore, the only carrier he could use in Florida covered only a limited pool of doctors that did not include his "regular doctors" for diabetes and other care. (Tr. 142 - 43, 146 - 47).

Those who do not qualify for Medicare because they worked less than the required 40 quarters under FICA face the same financial exposure in the private marketplace as retirees who are not yet 65, and therefore not yet age-qualified for Medicare. (Tr. 71, 80).

Other difficulties identified in the record included retirees' confusion about the transition from OP&F coverage to new plans under the Affordable Care Act, which in the view of some was addressed inadequately at meetings held around the state during the 2018 transition period (Tr. 38, 54, 99, 139); a short enrollment window that only began November 1 at which, for the first time, retirees could review available plans and try to understand the private insurance process (Tr. 101, 110); loss of access to specific providers (Tr. 101); potentially higher cost through increased deductibles. (Tr. 107); and disruption of ongoing physician-patient relationships because some providers were not available through plans offered through AON in 2019. (Tr. 159 – 60).

Despite these difficulties, it is abundantly clear in the record that the OP&F Board was thorough and conscientious in trying to accomplish the transition. Educational programs were held around the state for members, though for some they seemed inadequate. AON was retained by the Board, in preference to other responders to the RFP, in part because it is a large, national business that asserted it had experience in the challenging work required. (Def. Ex. EEEE). Further, the OP&F Board did not simply roll out this new arrangement and then step aside; the OP&F has been pro-active in 2019 and made changes seeking to improve the medical plan arrangements without waiting for the 2020 coverage to roll-out. (Tr. 131, 148 – 49; Def. Ex. [redacted]ore, the Board authorized keeping some retirees on the old OP&F (United Healthcare) self-funded plan until the end of June 2019 while they registered for Medicaid. (Tr. 70). Some retirees are also given additional stipends to address their financial hardships.

The change to a self-funded plan did not adversely affect all OP&F retirees. Some retirees have VA benefits available to them (Tr. 81, 87) or are able to gain coverage under a spouse's insurance. Furthermore, once out-of-pocket health care premiums formerly being paid by OP&F retirees under the self-insured (United Healthcare) plan are factored in with stipends now available, at least some retirees are financially better-off with the new arrangements.

III. The Breach of Contract Claim.

Plaintiffs make two legal claims. Their first claim is for breach of contract. For more than fifty years Ohio statutes have authorized the OP&F to "contract and be contracted with." R.C. 742.10, first adopted in Am. H.B. 642 (1965), retains that language in the first paragraph of the current version of the statute. The Ohio Supreme Court has recognized in a similar setting that such laws authorize contractual rights. *Schwarz v. Board of Trustees of Ohio State Univ.*, 31 Ohio St.3d 267, 270-71 (1987). [4]

In Ohio three classes of contracts are recognized: express, implied in fact, and implied in law. Express contracts arise when terms are openly and explicitly communicated, orally or in writing, by contracting parties. Generally speaking, an express contract is complete in and of itself, although where there is discretionary authority over an issue an implied duty of good faith in exercising that authority will exist. *Andrew v. Power Marketing Direct,* 10th Dist. No. 11AP-603, 2012-Ohio-4371, 978 N.E.2d 974, ¶¶27 – 31. This case involves an express contract. The terms are primarily spelled-out in state statutes, supplemented to some degree by explanatory documents distributed by the OP&F, and by the duty of good faith incumbent on the Board by the discretion conferred in the state statutes.

Plaintiffs and the class they represent argue that this case concerns an implied in fact contract, one term of which promised that the OP&F will either continue to operate a self-funded health care plan, or will provide very comparable private medical insurance in its place. Implied in fact contracts arise from a meeting of the minds shown by the surrounding circumstances, which make it inferable that a contract exists. They arise from a tacit understanding.

Implied in law or quasi-contracts are not true contracts. This is a form of legal liability inferred to do justice under exceptional circumstances. They arise from circumstances in which a person receives benefits to which they are not justly entitled. *LeVangie v. Raleigh,* 2nd Dist. No. 27946, 2019-Ohio-810, ¶ 16; *Salkin v. Case Western Reserve Univ.,* 8th Dist. No. 88041, 2007-Ohio-1139, ¶ 18; *Fouty v. Ohio Dept. of Youth Services,* 167 Ohio App.3d 508, 2006-Ohio-2957, ¶ 56. Quasi-contracts developed from

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[4] The recent Kentucky Supreme Court decision referenced above at footnote 2, holding that no contractual relationship exists with the Kentucky Employees Retirement System turns on a different historical background and different statutes, and is not applicable here.

a desire to "bring about justice without any reference to the intention of the parties, and sometimes contrary to their intention. The principle upon which they are founded is prevention of unjust enrichment, and the remedy provided is by an action as though it were upon a contract. [citations omitted]." *LeVangie, supra.*

Although much emphasized in testimony by plaintiffs, the reliance that members placed upon the OP&F Board - primarily evidenced by ongoing payroll deductions during employment - that medical insurance would always be available from OP&F essentially raises a quasi-contract claim.[5] That is, it relies upon the arguable unfairness of withdrawing generous medical insurance previously provided for many years as part of the overall benefits made available to OP&F retirees. For several reasons, the court cannot imply either in fact or in law any contract on these facts.

The first reason this cannot be done is that members of the OP&F system have an express contract with the retirement system. While to be sure it was primarily set out in Ohio statutes rather than in a more traditional pension plan document written by an employer and distributed to employees, it nevertheless is an express contract. It included some benefits and made others optional with OP&F. The law recognizes express agreements and implied contracts, but not for the same thing at the same time. Where an express contract exists, as it does here, no implied-in-fact contract, quasi-contract, or promissory estoppel claim may be maintained. *Vancrest Mgmt. Corp. v. Mullenhour,* 3d Dist. No. 1-18-59, 2019-Ohio-2958, ¶ 38; *Williams v. NAACP,* 10th Dist. No. 18AP-476, 2019-Ohio-1897, ¶ 24; *Salkin v. Case Western, supra,* ¶ 20; *Manno v. St. Felicitas Elementary School,* 161 Ohio App.3d 715, 2005-Ohio-3132, ¶ 31; *John Doe v. Univ. of Dayton,* 6th Cir. No. 18-3339, 2019 U.S. App. LEXIS 7680, * 31 (not for publication op.), citing *O'Neill v. Kemper Ins. Cos.,* 497 F.3d 578, 583 (6th Cir. 2007), quoting *Terry Barr Sales Agency v. All-Lock Co, Inc.* 96 F.3d 174, 181 (6th Cir. 1996); see also, *LeVangie, supra,* ("It is clearly the law in Ohio that an equitable action in quasi-contract for unjust enrichment will not lie when the subject matter of that claim is covered by an express contract or a contract implied in fact.")

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[5] In some ways plaintiffs also offer a claim for what is sometimes called detrimental reliance. But, "Ohio does not recognize a cause of action for detrimental reliance." It is "not a cause of action unto itself." *Interstate Gas Supply, Inc. v. Calex Corp.,* 10th Dist. No. 04AP-980, 2006-Ohio-638, ¶104.

As the court has already held in an earlier decision denying, in part, the motion to dismiss plaintiffs' case, promissory estoppel or equitable estoppel generally cannot apply against a state retirement system. *State ex rel. Simpson v. State Teachers Retirement Board,* 143 Ohio St.3d 307, 2015-Ohio-149, ¶ 32; *Ohio Ass'n of Pub. School Employees v. School Employees Retirement System Board,* 10th Dist. No. 04AP-136, 2004-Ohio-7101.

"A cause of action for breach of contract requires the claimant to establish the existence of a contract, the failure without legal excuse of the other party to perform where performance is due, and damages or loss resulting from the breach. [citations omitted.]" *Lucarell v. Nationwide Mut. Ins. Co.,* 152 Ohio St.3d 453, 2017-Ohio-15, ¶ 41; *Andrew v. Power Marketing, supra,* ¶ 34; *In re: Fifth Third Early Access Cash Advance Litigation,* 925 F.3d 265, 276 (6th Cir. 2019) (applying Ohio law).

Both *Power Marketing* and the *Lucarell* decision recognized that "every contract imposes an implied duty of good faith and fair dealing in its performance and enforcement." *Lucarell,* ¶ 42. However, "a claim for breach of contract subsumes the accompanying claim for breach of the duty of good faith and fair dealing." *Williams v. NAACP, supra,* ¶ 26. Thus, a case cannot stand or fall on the "good" or "bad" faith of the other contracting party under Ohio law.

The package of statutes in R.C. Ch. 742 are an integral part of the parties' express contract. "It is an elementary principle that any law relating to a contract which is in existence at the time of the execution of the contract becomes a part of such contract." *Eastern Machinery Co. v. Peck*, 161 Ohio St. 1, 6-7, 11 N.E.2d593 (1954), quoted with approval in *Doe v. Ronan*, 127 Ohio St.3d 188, 2010-Ohio-5072, fn. 5. One key statute is R.C. 742.45(A), providing in part that:

> The board of trustees of the Ohio police and fire pension fund ***may*** enter into an agreement with insurance companies, health insuring corporations, or government agencies authorized to do business in the state for issuance of a policy or contract of health, medical, hospital, or surgical benefits, or any combination thereof, for those individuals receiving service or disability pensions or survivor benefits subscribing to the plan. ***
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> The board ***may*** contract for coverage on the basis of part or all of the cost of the coverage to be paid from appropriate funds of the Ohio police and fire pension fund. The cost paid from the funds of the Ohio police and fire pension fund shall be included in the employer's contribution rates provided by sections 742.33 and 742.34 of the Revised Code. (emphasis added).

The relevant word is "may." In the context of R.C. Ch. 742 this grants permissive, discretionary authority rather than imposing an obligation. The Supreme Court of Ohio has acknowledged:

> Although it is true that in some instances the word "may" must be construed to mean "shall," and "shall" must be construed to mean "may," in such cases the intention that they shall be so construed must clearly appear. Ordinarily, the word "shall" is a mandatory one, whereas "may" denotes the granting of discretion.
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> *Dennison v. Dennison,* 165 Ohio St. 146, 149 (1956).

See also, State ex rel. Dworken v. Court of Common Pleas, 131 Ohio St. 23, 25 (1936) ("The great weight of American authority is that the word 'may' when used in a statute is permissive only, and operates to confer discretion, unless the contrary is clearly indicated by the context of the statute. [citation omitted.]") and *Robinson v. Fed. Housing Finance Agency,* 876 F.3d 220, 230 (6th Cir. 2017).

Importantly, this statute has never mandated that OP&F provide health care benefits. If benefits had unilaterally been switched by the OP&F (or the General Assembly) after they had vested, this would be a different case. The consistently discretionary nature of medical benefits was addressed explicitly at a pretrial conference in this case. The court directly inquired on the record asking whether in the last 40 years Ohio statutes ever provided that retirees would receive health care benefits as a guaranteed part of their retirement through OF&F. Plaintiffs' counsel candidly acknowledged that to the best of their knowledge medical benefits had always been permissive. (May 2, 2019 Tr. at 12 – 13.) Presentations at trial and in post-trial memoranda have not suggested otherwise.

Because health care benefits have never been explicitly promised to retirees, and because the record proves that the OP&F Board has acted in good faith in addressing this issue in recent years, plaintiffs have not proven a breach of contract.

Beyond what has been said before on the contract between OP&F and retirees, it must be noted in closing that "[i]t is not the responsibility or function of [a] court to rewrite the parties' contract in order to provide for a more equitable result." *Foster Wheeler Enviresponse, Inc. v. Franklin Cty. Convention Facilities Auth.,* 78 Ohio St.3d 353, 362 (1997). Difficulties, no matter how serious, in obtaining medical care under the new stipend model offered by OP&F do not open the door for a court to impose a broader

duty on OP&F. The General Assembly concluded health care was not essential to the retirement benefits package due first responders. If that is unjust to retirees, and contrary to the public's interest in keeping highly trained first-responders at work for public safety, the remedy must be obtained in the legislature.

IV. Plaintiffs' Mandamus Claim.

Plaintiffs' second claim seeks a Writ of Mandamus. A Writ may issue from a court when a public agency owes a clear legal duty but is not discharging it; or where an agency has discretion in carrying out public functions but abuses its discretion - acts irrationally and without any meaningful evidence – in making the decision. This remedy is called an "extraordinary remedy" because it reserved for situations in which there is no opportunity to appeal, or otherwise gain meaningful review. A recent decision of the Ohio Supreme Court summarized this area of law as follows:

> [A] mandamus action is appropriate when there is a legal basis to compel *** [a government agency] to perform its clear legal duty to do so under the law, including when the [agency] has abused its discretion in carrying out its duties. A court issues a writ of mandamus when a relator demonstrates that it has a clear legal right to the relief requested, the *** [agency] has a clear legal duty to provide such relief, and there is a lack of an adequate remedy in the ordinary course of the law.

State ex rel. Belle Tire Distributors v. Indus. Comm'n of Ohio, Slip Op. ____ Ohio St.3d ____, 2018-Ohio-2122, ¶ 25 (internal citations omitted). In dissent, Justice DeWine mentioned an 1857 Ohio decision holding that mandamus is used "only 'on occasions where the law had established no specific remedy.'" *Id.*, ¶ 34.

Mandamus is used in a variety of settings, including review of some types of decisions by retirement funds. *E.g., State ex rel. Brust v. Chambers*-Smith, Slip Op. ____ Ohio St.3d ____, 2019-Ohio-857 (factual inaccuracies in parole records); *State ex rel. Belle Tire, supra,* ¶ 25 (employer's challenge to Industrial Commission decision to exercise continuing jurisdiction); *State ex rel. Leneghan v. Husted*, 154 Ohio St.3d 60, 2018-Ohio-3361 (election contest); *State ex rel. Marmaduke v. Ohio Police & Fire Pension Fund*, 147 Ohio St.3d 390, 2016-Ohio-5550, ¶ 16 (mandamus available to correct abuse of discretion by OP&F board in denying benefits); *State ex rel. Danstat Builders, Inc. v. Indus. Comm.*, 108 Ohio St.3d 315, 2006-Ohio-1060 (employer contesting specific safety violation).

Ohio law places the burden of proof on the party seeking a Writ, and it can only be met by clear and convincing evidence. *State ex rel. Leneghan, supra,* ¶ 24. Evidence about a challenged decision must demonstrate an "abuse of discretion" which is ordinarily defined as a decision that is "unreasonable, arbitrary, or unconscionable." *State ex rel. Simpson, supra,* ¶ 19. "When 'some evidence' supports the board's decision, a writ of mandamus will not issue to control an agency's exercise of discretion. [citations omitted]." *Id.*, ¶ 18; *State ex rel. Turner Construction, supra,* ¶ 12.

Defendant has argued throughout this case that because the OP&F Board has statutory discretion to provide healthcare, and may choose not to do so at all, that its decisions in this area are completely non-reviewable. The court sees it differently. The issue in mandamus is whether "some evidence" supports the OP&F Board's conclusions that it was prudent to materially alter the longstanding self-funded health care plan and, if so, that it was prudent to move to the stipend model administered with AON when it did. To some extent this is simply another way of asking whether the Board breached a contractual duty of good faith owed retirees, as addressed above.

The Board cannot be a guarantor of optimal investment results. The Board cannot alter the statutory priority for funding retirement and disability benefits. The Board cannot alter the funding formula used to gather money needed to pay benefits. While the Board is obligated to make decisions informed by the fiduciary duty owed retirees, and which are not unreasonable, arbitrary, or unconscionable, the Board cannot spin straw into gold.

The record here does not demonstrate that the OP&F Board abused its discretion or acted in the absence of meaningful evidence in studying health care benefit issues, in adopting a new stipend model, or in selecting AON to assist in administering it. The claim for a Writ of Mandamus is therefore Denied.

In closing this discussion, the court must again point out that under Ohio law it cannot alter the statutory discretion conferred on the Board with respect to health care by R.C. 742.45(A). "It is axiomatic that in mandamus proceedings, the creation of the legal duty that a relator seeks to enforce is the distinct function of the legislative branch of government, and courts are not authorized to create the legal duty enforceable in mandamus." *State ex rel. Patton v. Rhodes,* 129 Ohio St.3d 182, 2011-Ohio-3093, ¶ 17 (internal citations omitted.)

For these reasons, Judgment will be entered dismissing the claims of the plaintiff class, and taxing costs.

IT IS SO ORDERED.

APPENDIX
SUMMARY OF SIGNIFICANT EVENTS

Date	Event	Reference	Description
1965	Ohio Police & Fire Pension Fund Created	Def. Exhibit J, Trial 0313; R.C. 742.02	Ohio Police & Fire Pension Fund created by the General Assembly.
January 1, 1967	OP&F Pension Fund Began	Def. Exhibit J, Trial 0313	OP&F Pension Fund commenced operations.
1974	OGA Adds Health Care	Def. Exhibit Q, Trial 0765; R.C. 742.45(A)	OP&F begins sponsoring health care benefits.
1990's	Health Care Stabilization Fund	Def. Exhibit Y	HCSF created and funded by employer contribution, investment returns, and until December 31, 2018, premiums paid by participants in the health care program.
2012	Ohio Pension Reform Act	R.C. 742.37	General Assembly adopts the Pension Reform Act. effective in 2013.
2012-2015	Employee Contribution Increase	Def. Exhibit J, Trial 0426	Under the Pension Reform Act from 2013-2015, employee contribution rate increased to 12.25% (2015) of payroll (from 10.00% in 1988-2013.)
2013	Reduction of Employer Contribution to HCSF	Def. Exhibit J, Trial 0426	Board reduces employer contribution to HCSF from 6.75% (in 2012) to .5% (2014 - present) of payroll. Employer contribution rate remains (1986 – present) at 19.50% police and 24.00% fire.
March 5-6, 2015	Annual Board Retreat	Def. Exhibit A, Trial 013	OP&F actuary (Buck Consultants, LLC) reports reduction of contribution rate 2.85% to .50% leaves HCSF projected insolvent by 2024. Board agrees to retain independent health care consultant for more guidance.
Spring of 2015	Member's Report	Def. Exhibit C, Trial 063	OP&F Quarterly Report notifying the members of updates with the health care situation.
September 8, 2015	Board Issued RFP to Retain Health Care Advisor	Def. Exhibit G, Trial 0221	The Board issued an RFP to receive health care advise to select the best option going forward.
January, 2016	Gabriel Roeder Smith ("GRS") Hired	Pltfs. Ex. 2	

March 3, 2016	Annual Board Retreat	Def. Exhibit M, Trial 0468-0490	GRS presented several broad strategic concepts for addressing health care.
April 26, 2016	Board Meeting: GRS Presentation	Def. Exhibit O, Trial 0557-0592	GRS presented 33 options for benefit and eligibility changes to OP&F health plan to enhance the solvency of HCSF. The Board narrowed the options to 12 recommended changes for 2017.
May 17-18, 2016	Board Meeting: GRS Presentation	Def. Exhibit P, Trial 0692-0695	GRS presented 12 recommended to HCSF.
June 28-29, 2016	Board Meeting: Adoption of Recommended Changes	Def. Exhibit Q, Trial 0793	Board adopted 11/12 recommended changes commencing January 1, 2017 (elimination of Medicare Part B reimbursement was not adopted)
Summer of 2016	Member Reports	Def. Exhibit R, Trial 796,801; Pltfs. Ex. 4	Changes to HCSF described in summer quarterly newsletter, and website.
November 1, 2016	Special Board Retreat	Def. Exhibit V-2, Trial 0864-883	Board held a special retreat to discuss health care. GRS presented whether the Board should continue with the "defined benefit" health care plan or move to a "defined contribution" plan.
March 2, 2017	Board Spring Retreat	Def. Ex. BB, Trial 1151-1165; Pltfs. 5	GRS presented to the Board regarding sustainability consideration for the HCSF.
March 29, 2017	Regular Board Meeting	Def. Ex. CC, Trial 1174-1179; Pltfs. Exs. 6, 50.	The Board voted to exit the self-insurance model and transition to individual health care policies, which OP&F would support through a fixed stipend.
Spring of 2017	Member's Report	Def. Exhibit DD, Trial 1361	OP&F Quarterly Report notifying the members of updates with the health care transition.
May 31, 2017	RFP Issued to Select Vender	Pl. Ex.8	Board issued an RFP to select a vendor to implement the new health care plan. Submission deadline July 21, 2017.
August 22, 2017	Regular Board Meeting	Def. Exhibit KK, Trial 1551-1552; Pl. Ex. 9	GRS presented the benefits and disadvantages of a closed group exchange v. an open exchange. Staff advised the Board that the six bids were scheduled for visits, and the finalists would make presentations in September. Board directed staff to pursue a simultaneous transition of Medicare and Pre-Medicare members.

August 24-29, 2017	RFP Committee	Pltfs. Exs. 10, 98	RFP Committee narrow to UHC, AON, and Conduent. RFP Committee meet with the three finalists.
September 27, 2017	Board Meeting	Def. Ex. OO, Trial 1672	Board delayed selecting a vendor until November to receive additional input from fraternal groups and membership.
November 14-15, 2017	Board Meeting	Def. Ex. PP, Trial 1694; Pltfs. Exs. 18, 21	The Board selected Aon over UHC and Conduent. Notice by website to retirees.
Spring 2018		Pl. Ex. 24	Board sets stipend amounts available to retirees.
Fall 2018	Education efforts by Board	Pl. Exs. 29, 30, 34, 35	Written notices mailed June 2018, open enrollment letters September 2018, and reminder notices October and November 2018.
October 15, 2018	Enrollment Open	Pl. Exhibit 34	Enrollment opened for Medicare eligible retirees.
November 1, 2018	Enrollment Open	Pl. Exhibit 35	Enrollment opened for Pre-Medicare eligible retirees.
December 20, 2018	Complaint, Motion for TRO		*Zwegat* civil case filed.
December 28, 2018	Journal Entry		Judge Brown denies Temporary Restraining Order.
January 1, 2019		Def. Exhibits KKKK-LLLL	New health care plan takes effect.
March 22, 2019	Journal Entry		Court certifies class action under Civ. R. 23(B).
April 1, 2019	Expanded Coverage	Def. Exhibit SSS	Board expands coverage stipend used to purchase extended health care coverage through COBRA. Starting in 2020, stipend may be used for coverage outside Aon.

Franklin County Court of Common Pleas

Date: 10-21-2019

Case Title: ALAN ZWEGAT ET AL -VS- BOARD TRUSTEES ET AL

Case Number: 18CV010593

Type: DECISION

It Is So Ordered.

/s/ Judge Richard A. Frye

Court Disposition

Case Number: 18CV010593

Case Style: ALAN ZWEGAT ET AL -VS- BOARD TRUSTEES ET AL

Case Terminated: 06 - Court Trial

Motion Tie Off Information:

1. Motion CMS Document Id: 18CV0105932019-06-0899980000
   Document Title: 06-08-2019-MOTION IN LIMINE - DEFENDANT: BOARD TRUSTEES
   Disposition: MOTION DENIED

2. Motion CMS Document Id: 18CV0105932019-06-0799430000
   Document Title: 06-07-2019-MOTION IN LIMINE - DEFENDANT: BOARD TRUSTEES
   Disposition: MOTION DENIED

3. Motion CMS Document Id: 18CV0105932019-05-2999950000
   Document Title: 05-29-2019-MOTION TO STRIKE - DEFENDANT: BOARD TRUSTEES
   Disposition: MOTION DENIED